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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

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No. 71-492

LLOYD CORPORATION, LTD.,
Petitioner,
v.
DONALD M. TANNER, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF THE AMERICAN RETAIL FEDERATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF OF THE AMERICAN RETAIL FEDERATION, AS AMICUS CURIAE, IN SUPPORT OF THE PETITIONER

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MOTION OF THE AMERICAN RETAIL FEDERATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Retail Federation ("Federation") hereby respectfully moves for leave to file a brief as *amicus curiae* in the instant case as provided for in Rule 42 of the Rules of this Court. While the consent of counsel for Respondents has been obtained, Counsel for Petitioner has refused his consent.

INTEREST OF THE FEDERATION

The Federation is an organization composed of seventy-eight national and state retail associations. The membership of these associations consists of a wide variety of

retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry. Through these associations, the Federation represents approximately eight hundred thousand retailers with close to six million employees.

The question presented in the instant case is a matter of continuing importance to the Federation.[1] Briefly stated, that question is whether the owner of a private shopping center has a Constitutional obligation to make available such property for the use of those who desire to espouse any ideas thereon and notwithstanding the availability of effective alternative locations to engage in such activities.

Shopping centers can be of practically any size, ranging from a collection of large national retail operations to local, neighborhood centers with but a few small independent stores. In fact, the characteristics of a shopping center do not materially differ from other types of retail enterprises, such as discount houses or large department stores, which are not generally regarded as "shopping centers." The interest of the Federation is thus predicated on the substantial and far-reaching consequences that any decision here may have for all methods of retail operation. The Federation is also concerned that this Court should be aware of the manifold ramifications of any requirement that retailers, by necessarily opening their property to business invitees, thereby become obligated to permit their property to become a battleground for a variety of controversial competing uses. For these reasons, the Federation requests this opportunity to present its views on the instant case to this Court.

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[1] The Federation, for example, has submitted briefs *amicus curiae* to this Court in the related cases of *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Taggart* v. *Weinacker's*, 397 U.S. 223 (1970); *Central Hardware Company* v. *N.L.R.B.*, No. 70-223; and *Homart Development Co.* v. *Diamond, et al.*, No. 1469.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying *amicus* brief in the present case in support of the position of the Petitioner.

Respectfully submitted,

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BRIEF OF THE AMERICAN RETAIL FEDERATION, AS AMICUS CURIAE, IN SUPPORT OF THE PETITIONER

This *amicus* brief is filed by the American Retail Federation contingent upon the Court's granting the foregoing motion for leave to file a brief as *amicus curiae*.

INTEREST OF THE AMICUS CURIAE

The interest of the Federation is set out at pp. 1-2, of the foregoing motion for leave to file a brief as *amicus curiae*.

ARGUMENT

INTRODUCTION

In this case, together with two others currently pending before this Court and raising the same or related

issues,[1] an opportunity is afforded to resolve a conflict between competing rights guaranteed in the First, Fifth and Fourteenth Amendments of the Constitution of the United States. Efforts by various inferior courts to effect such a resolution have given rise to a variety of inconsistent opinions[2] resulting largely from those courts' attempts to apply decisional authority of this Court, whose holdings themselves do not readily mesh, to situations for which those decisions were not intended to provide a solution.

Specifically, the Constitutional conflict presented occurs when groups assert the right to engage in First Amendment activity on the private property of an unwilling owner for purposes unrelated to the uses for which the property was intended and is put, while the owner seeks to limit such a claimed right to the use of his property in reliance on the property rights which are created by state law and which are recognized and guaranteed in the Fifth and Fourteenth Amendments. The diversity which has resulted from courts' efforts to adjudicate these competing claims is a product of their disagreement as to the meaning and scope of this Court's decision in *Marsh* v. *Alabama*, 326 U.S. 501 and *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308.

The court below read these cases to require a privately owned shopping center to permit its premises to be used by any group desiring to engage in any First Amendment activity without regard to the preference of the

[1] *Central Hardware Company* v. *N.L.R.B.*, No. 70-223, October Term, 1970, certiorari granted; *Homart Development Co.* v. *Diamond, et al.*, No. 1469, October Term, 1970, (petition for rehearing pending). The American Retail Federation has also filed briefs *amicus curiae* in each of these cases as well as previously in *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308, and *Taggert* v. *Weinacker's*, 397 U.S. 233.

[2] See, for example, pp. 9, 10 of the Petition for Writ of Certiorari herein.

owner, or to the inconvenience or the increased cost or the loss of income which might result, and without regard to the concurrent availability of reasonably equivalent alternative non-private sites for the exercise of the desired First Amendment activity.

It is submitted that neither sound policy nor any decision of this Court compels or warrants such a result; to the extent a contrary inference may be drawn from the language of any such decision, this Court should take appropriate corrective action.

A. The Meaning and Limits of Marsh and Logan Valley.

The court below gleaned from *Marsh* and *Logan Valley* the rule that private property which is opened to the public for the transaction of business becomes the "functional equivalent of a public business district" and, as such, becomes subject to the same exercise of First Amendment rights as municipal property. In effect, according to this conclusion, any such private property becomes a kind of town square in which all varieties of charitable, religious, paternal, social and political groups may use the property for any form of solicitation or discussion of any subjects not themselves unlawful or likely to result in injury to persons or property.

In *Marsh*, however, this Court held only that private property may be converted to a public use when the alternative is to prohibit any effective First Amendment communication. Thus, in *Marsh*, the entire town was privately owned and the single area in which groups of persons congregated was a business district extending for only one block between streets leading to highways. Accordingly, denial of access to the business district would be equivalent to a total denial of an opportunity for reasonably effective communication with the inhabitants of the town. In determining to treat the privately owned town as if it were an ordinary municipality, the Court created a rationale which would give effect to the

guarantees of the First Amendment. To say thereafter that the business district of this company-owned town was the "functional equivalent" of a public business district is a description of the situation in *Marsh*, but not a general rule of law. Indeed, the holding of *Marsh* is very narrow. It stands for the proposition that, for First Amendment purposes, a company-owned town is like an ordinary town—a rule which is surely inapplicable here. The broadest principle for which *Marsh* may be said to stand is the proposition that where private property constitutes the functional equivalent of public property then First Amendment obligations are incurred by the owners of the property. But when does such a "functional equivalence" occur? *Marsh* provides no answer beyond a reference to its unique facts in which the private property is *intended* to function analogously to public property. Significantly, Justice Black, the author of the Court's opinion in *Marsh*, stated his view, in his dissent in *Logan Valley*, that such "functional equivalence" occurs

> ". . . when that [private] property has taken on *all* the attributes of a town, *i.e.*, 'residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated'." (Original emphasis)

In short, neither the facts, the language, the results, nor the author of *Marsh* provides support for the view, adopted below, that private property intended and used only as a shopping center is the "functional equivalent" of municipal property for the exercise of non-property-related First Amendment purposes *where effective alternative public sites are also available.* Rather, the underlying basis of *Marsh* was that there must be *some* place where inhabitants of a town or city may effectively be reached by those seeking to engage in First Amendment communication.

> "Many people in the United States live in company-owned towns. These people, just as residents of mu-

> nicipalities, are free citizens of their state and country. . . . To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizens." (326 U.S. at 508, 9.)

In a situation such as existed in *Marsh*, where, all the property being privately owned, the problem of obtaining free and uncensored information was real, there was a reasonable necessity to treat portions of that property as if they were public. However, in the ordinary municipality, where effective avenues exist for the dissemination of such information without the danger of limitation through the private control of all effective means of communication, that necessity does not exist. *Marsh*, therefore, does *not* stand for the proposition that every privately owned "business block or district" of every town should be converted to public property for First Amendment purposes.

Nor does *Logan Valley* so hold or suggest. After recognizing expressly that the private owner of a shopping center may well possess the right to limit the use of his property in a manner that would not be permissible were the property owned by a municipality, the Court rendered a quite narrow holding:

> "All we decide here is that because the shopping center serves as the community business block 'and is freely accessible and open to the people of the area and those passing through,' Marsh v. Alabama, 346 U.S. at 508, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put."

While citing *Marsh*, the Court in *Logan Valley* appeared to go beyond the former decision by requiring private property to serve as if it were public when a desired First Amendment use is "generally consonant with the use to which the property is actually put" rather than because of the unavailability of effective alternative public means of communication. However, the distinction in criteria is more apparent than real. For the Court's opinion in *Logan Valley* reveals that its principal concern was that a business entity should not be able to "immunize" itself from "criticism." Thus, the Court noted that absent access to the Logan Valley Plaza the First Amendment purpose would have been thwarted; the pickets involved would have been forced to carry their message at such a distance from those sought to be reached, and under such adverse circumstances, as to be without impact altogether. And with respect to picketing at any other location, the Court observed that such picketing would be subject to the secondary boycott proscriptions of the National Labor Relations Act. Accordingly, in *Logan Valley*, the only effective site for the First Amendment activities sought to be engaged in was the private shopping center property itself. So interpreted, *Marsh* and *Logan Valley* are rendered consistent and compatible with one another.

Similarly, by framing the rule under which private property is impressed with a public character to focus upon a "generally consonant" use, the Court in *Logan Valley* appears only to have expressed as a legal principle the assumption that where a relationship exists between a First Amendment purpose and a property's use, then that property is the only effective site for the realization of that purpose. Although there are situations in which this assumption is justified, in an era of increasingly sophisticated use of public media, the situations in which it is not warranted do, or will, predominate.

Nor should it be presumed that this assumption is particularly appropriate to "shopping centers," whose diversity in function and purpose precludes treating them as if they were alike for any—including First Amendment—purposes. For example, there are many retail establishments which offer not only their own merchandise, but also the merchandise of others through leased departments or concessions and which have parking areas open to the public; there are large free-standing retail stores, frequently associated with or part of national retail concerns, located on their own tract of land with public parking area; there are retail enterprises which, instead of being constructed on a horizontal plane, as in the case of suburban shopping centers, are constructed on a vertical plane due to space limitations such as those existing in downtown urban areas; there are multiple stores, businesses and offices located within a single building with a common entranceway, stairwell and corridors, and multiple manufacturing or retail establishments located within industrial parks and connected only by means of a series of private roads fronting one public artery. All such enterprises, regardless of size, shape or the terms used to describe them, are open to the community and function as "shopping centers", and may thus be subject to the same demands as those which gave rise to the instant case. However, the social role of a huge shopping complex in a small town otherwise lacking a "town square" or another "business district" is entirely different from its role in an urban community and different, too, from the role of a complex of two or three small stores in the heart of a large city or a single free-standing store with adjoining parking facilities. Yet, all of these distinctive entities are "shopping centers", or constitute "business districts", or "town squares." [3]

[3] See, for example, *Diamond* v. *Bland*, 3 Cal. 3d 653, 477 P.2d 733 (1970), pending in this Court on Petition for Rehearing sub. nom. *Homart Development Co.* v. *Diamond* (No. 1469, O.T., 1970); *Central Hardware Co.* v. *N.L.R.B.*, now pending in this Court on writ of certiorari (No. 70-223, O.T., 1970).

and would thus equally be subject to First Amendment use unrelated to the purposes of the private property according to the extension of *Logan Valley* effected by the court below and those others which similarly misinterpret the breadth of *Logan Valley* and its relationship to *Marsh*.

In sum, in this age of increasingly vocal dissent and social polarization it is particularly important to define the extent to which owners of property onto which the public is invited to do business should be required to permit their property to become a battleground for opposing viewpoints, inconsistent or contrary to the purpose for which the property was designed and maintained. This Court's decisions in *Marsh* and *Logan Valley*, whose distilled holdings could guide the lower courts to a uniform and fair balance between the competing rights involved, have not succeeded in doing so. For courts have seized upon their rhetoric, rather than their logic, have raised descriptive terms to the status of rules of law, and have then applied them to entities called "shopping centers" or "business districts" as if the business configurations represented by these terms were rationally susceptible to such uniform treatment. A compelling need therefore exists both to reconstruct a principle or series of principles to govern this area and to discontinue reliance on concepts which are inappropriate to a resolution of the situations to which courts have, with increasing difficulty and confusion, applied them.

B. A Proposed Rule Which Harmonizes the Authorities and Fairly Accommodates Competing Constitutional Claims.

As has been noted, courts' analysis of the impact of the First Amendment upon the right of private landowners reasonably to restrict the use of their premises has suffered from two infirmities. First, cases have been decided either on the basis of "rules" or "tests" which

were only descriptions of results reached in particular factual contexts or on the basis of assumptions which were elevated to the status of rules of law. And second, courts have tended, as did the court below, to ignore this Court's direction in *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, to reach an accommodation with as little destruction of one competing right as is consistent with the maintenance of the other.

The Federation believes that a fair and reasonable analysis of the principal decided authorities concerning the instant issue, in the light of the direction of *Babcock & Wilcox*, yields a rule of law fairly balancing the competing interests without reliance on descriptive rules and legal fictions:

> Owners of private establishments catering to the public may deny the use of their premises to those who wish to use those premises for First Amendment activities unrelated to the purpose for which the public is invited *except* when no reasonably effective alternative means of communication is available.

This rule achieves a fair balance between the opposing Constitutional grants.[4] Those wishing to exercise First Amendment rights are *guaranteed* the right effectively to do so, including, as a last resort, the *right* to use others' private property; those who own property may limit the propaganda use to which strangers may put that property, except when no other reasonably effective means is available for the expression of legally permissible views.

In practice, courts have followed this rule irrespective of the rhetoric they have employed. Thus, in *Marsh* v. *Alabama*, the use of private property was permitted since, all the town's property being private, *no* alterna-

[4] Such a rule would similarly apply to and resolve the related disputes in *Central Hardware* (No. 70-223) and *Homart* (No. 1469) currently also pending before this Court.

legitimizing the public use of private property. Nor should such public use be barred, without further inquiry, because there exists no such general consonance. Let it be assumed, as a variation of the facts in *Wolin*, that servicemen bound for Vietnam were assembled as a group only in a private restaurant located in a shopping center, but that their times of departure were so staggered that *nowhere else* would they appear as a group. Would it not be reasonable to permit an anti-war demonstration directed to them to be conducted on center property near the restaurant's premises, irrespective of the fact that the uses to which the center and restaurant are put are *unrelated* to the purpose of the demonstration, simply because no other site and time affords an effective means of communication with those servicemen? Conversely, would it not also be reasonable to bar such demonstrations on private property, even though the use of that property is directly related to the purpose of the demonstration, when it appears that there *do* exist reasonably effective alternative means to achieve the same communication without invading private property?

Apart from achieving a fair balance of competing rights without destroying either, the proposed rule yields additional benefits. The holding of the court below allows every group or cause which would be permitted in a public park to come upon private shopping center premises, subject to reasonable regulation.[6] Given the virtually unlimited number of such groups and causes and the potentially divisive and inflammatory effect many would have on their consumer audience, the problem of "regulation" becomes a very serious one.[6] While the proposed rule would not avoid that problem altogether, the

[6] In addition to judgmental decisions seeking the least disruption of center business consistent with effective First Amendment use, "regulation" also involves maintenance and policing costs which must be borne by those whose businesses are, to some extent, being disrupted. There is also the matter of liability for injury both to consumers and to those seeking to exercise First Amendment rights, and added insurance costs, among other problems and costs related to or involved in such "regulation".

mere fact that it would limit the number of such incursions to those instances where no reasonably effective alternatives exist would render that problem more manageable and susceptible of a more relaxed and thoughtful disposition whenever it did arise.

Nor would courts become flooded with suits seeking a determination of the validity of the multitude of varying regulations which the various "shopping centers" would otherwise continually be required to improvise.

On the other hand, failure to adopt a rule such as that proposed here in favor of a continuing reliance upon concepts such as "generally consonant use," or "functional equivalent" of public property, or "quasi-public" "business blocks" will involve the judicial system in an increasing volume of legal hair-splitting, and will substitute diversity for clarity. For example, whereas a shopping center catering to and admitting all members of the public has been described as the functional equivalent of public property, would the same apply to the property of a wholesale operation which neither invites nor services the public at large? Where an office building provides a mall or lobby area for the use of its tenants and their guests, does such a mall become the equivalent of public property or a part of a "business block" such that strangers may assert unrelated First Amendment rights? If such property is not deemed converted to public property, may strangers nonetheless Constitutionally require the use of such a mall where their purpose is "generally consonant" with the property's use? Does the parking lot of a shopping center or public amusement center lose its character as a "business district" subject to competing First Amendment uses when the center charges an admission or parking fee? At least one court has concluded that it does, and this Court subsequently denied certiorari.[7] However, the fact that the center requires this fee

[7] *Ball* v. *California*, —— U.S. ——, 30 L.Ed 2d 189 (No. 71-209, Oct. 26, 1971).

neither affects its business role or purpose nor its social role in the community. By analogy to *Wolin* and *Hoffman*, *supra*, do the premises of a privately owned and operated utility become subject to unrelated First Amendment usese by virtue of their similarity to an instrumentality of the state? Do such premises become less "public" if a charge is assessed for the use of the parking facilities surrounding the utility? Do state regulated and licensed business enterprises become "public" by analogy to *Marsh* or *Wolin* or *Hoffman?*

In short, an approach to the resolution of claims of competing Constitutional guarantees which focuses on fictional concepts such as "quasi-public" or "functional equivalence" invites judicial discord since the decisional variables lack even intuitive appropriateness to the problems they are supposed to resolve.

This is particularly true since the same courts which would be faced with the determination of what those tests require in an almost infinite variety of factual contexts involving attempted public use of private property are simultaneously also faced with this Court's teaching that even the State may prohibit peaceful First Amendment uses on its (*i.e.*, public) property despite the fact that the place chosen is "particularly appropriate" (*generally consonant?*) for such uses.[8]

Rather, if the value of a guaranteed property right is not to be vitiated, that right must include the authority to exclude all who seek to use it for purposes other than that for which the owner intends it *unless* the exercise of that right *prevents* the effective exercise by others of First Amendment activity. Also included in such control is the authority to choose what forms of First Amendment activity shall be permitted on the property and which shall not. When the owner of property believes

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[8] *Adderly* v. *Florida*, 485 U.S. 39, 47; *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 500.

that the commercial value of his property, or his profit, will be enhanced by the exhibit of a certain attraction or an invitation to a specific, even controversial, speaker, he should not be required to make the same premises available to others who, in his view, would not produce the same benefit. Otherwise, the worth of his property right becomes diminished to the significant extent that the effort to increase its value or productiveness converts it, automatically, to public property burdened with the same duties which affect the State's property. All this is subject, as has been stated before, to the assumption that those who would seek to come upon commercial private property catering to the public do have reasonably effective alternative means for the achievement of their First Amendment objectives.[9] If they do not, the rights of property to that extent become subordinated. And upon a showing by those who seek access to such property that they have made reasonable efforts to utilize such alterna-

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[9] For a partial description of such means see, e.g., the various means of expression described at footnote 1 of *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956). Moreover, as a pre-*Logan Valley* study by the Federation of the 1967 editions of the Retail Clerks Union's magazine, *The Retail Clerks Advocate*, amply demonstrates, there are a host of additional devices which that union, seeking to communicate a far more limited message has utilized: a national consumer boycott involving "hundreds of picket demonstrations, tens of millions of leaflets, balloons and bumper stickers . . . to tell the story" (June, 1967, p. 3); announcements on a national television network "to advise customers of the benefits of shopping where they see the RCIA store card" (July, 1967, p. 18); state and county fairs, holiday celebrations and othen summer festivalse to provide "the opportunity to publicize the RCIA and the union store card" (October, 1967, p. 12); extensive distribution of RCIA shopping bags (June, 1967, p. 5 and October, 1967, p. 12); outdoor billboards in "strategic locations" (July, 1967, p. 14); sponsorship of local radio or television programs (October, 1967, p. 12, and April, 1967, p. 16); sponsorship of local sports teams (October, 1967, p. 28); union-industry show exhibits (July, 1967, p. 14); a "mile-long caravan" of automobiles to protest the Sunday selling of cars (January, 1967, p. 28); and even sky-writing, "a new idea in publicizing the 'shop union' theme" (November, 1967, p. 26).

tives and have been unsuccessful or that no effective alternatives exist, access is provided and guaranteed.[10]

By adopting such an approach, and avoiding reliance upon fictions and tests virtually impossible to apply rationally, this Court will adhere to its view, expressed in *Babcock & Wilcox*, that when dealing with competing rights, "accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other."

CONCLUSION

For the reasons stated herein as well as those urged by Petitioners, the Court is requested to reverse the court below.

Respectfully submitted,

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[10] Such a burden of proof upon those seeking to exercise First Amendment rights on another's private property was imposed in *NLRB* v. *Tamiment, Inc.*, 451 F.2d 794 (CA3, 1971).